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Nos. 86-622 and 86-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE TRAYNOR,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION,

Respondent.

JAMES P. MCKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Second Circuit and the Circuit for the District of Columbia

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BRIEF AMICUS CURIAE OF VIETNAM VETERANS OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, under section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a), the federal courts have jurisdiction to review and set aside regulations promulgated and policies adopted by the Veterans' Administration that are in excess of or contrary to the agency's authority under the Veterans' Benefits Law or other provisions of federal law.

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BRIEF AMICUS CURIAE OF VIETNAM VETERANS OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE [1]

This brief is filed on behalf of the Vietnam Veterans of America ("Vietnam Veterans") in support of peti-

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[1] Pursuant to Rule 36 of the Supreme Court Rules, written consent to file this brief has been obtained from counsel of record for all parties. The letters of consent have been filed with the Clerk of the Court.

tioners. Vietnam Veterans is the largest national service organization devoted exclusively to serving the interests and addressing the concerns of veterans who served in the military during the Vietnam era. A non-profit organization founded in 1978 and chartered by an Act of Congress, Vietnam Veterans has a membership of 35,000 with 295 chapters nationwide.

The interest of Vietnam Veterans in the present litigation is to ensure that section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a), be read in accordance with its express terms and with Congress' intent to preclude judicial review only of Veterans' Administration ("VA") decisions in individual benefits claims cases.[2] Vietnam Veterans' purpose in seeking a ruling that section 211(a) has limited preclusive effect is to guarantee that the VA not be allowed to act contrary to its statutory authority in the promulgation of regulations and adoption of policies affecting millions of Vietnam era and other veterans.

Vietnam Veterans, through Vietnam Veterans of America Legal Services, offers many different kinds of assistance to its members ranging from legal representation in VA proceedings to the publication of educational materials. One of the most important objectives of Vietnam Veterans is to ensure that the VA acts consistently with the provisions of the Veterans' Benefits Law. As part of this effort, Vietnam Veterans has served as coun-

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[2] Vietnam Veterans believes that section 211(a) does not bar review of those Veterans' Administration actions that the agency itself has described as "its regulations and substantive agency actions of broad application." *See H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the Committee on Veterans' Affairs, House of Representatives*, 99th Cong., 2d Sess., Vol. II, 328 [hereinafter cited to as "1986 House Hearings"]. For purposes of this brief, Vietnam Veterans refers to these categories of Veterans' Administration actions as "regulations and policies."

sel for individual veterans and groups of veterans seeking judicial review of the validity of important VA regulations and policies that affect many of its members. One of the policies that Vietnam Veterans has challenged in litigation is the same one challenged in the cases now before this Court. Vietnam Veterans has been acting as co-counsel in *Buck v. Veterans Administration*, No. CV-86-3522 (E.D. Pa. Oct. 16, 1986) (order dismissing complaint), *appeal docketed*, No. 86-1656 (3rd Cir. Oct. 28, 1986), a case in which the plaintiff has challenged the validity of the VA policy that excludes certain veterans disabled by alcohol from participation in the veterans pension program. The district court dismissed the complaint in *Buck* on the ground that the court was precluded from hearing the case by section 211(a). On appeal the Third Circuit has stayed proceedings in *Buck* pending the outcome of the cases currently before this Court. Vietnam Veterans urges this Court to sustain petitioners' challenges on the merits to the VA alcoholism policy, as well as to adopt a reading of section 211(a) that will permit judicial review of such policies and regulations.

In Vietnam Veterans' experience, section 211(a) is the critical statutory provision in determining whether or not the Veterans' Administration will be held accountable to apply the provisions of the Veterans' Benefits Law and other federal statutes rationally and fairly. Simply put, if section 211(a) is construed broadly to prohibit court review of Veterans' Administration regulations and policies that are arguably unlawful, the Veterans' Administration will be largely unconstrained in implementing its own will, rather than that of Congress. The narrower reading of section 211(a) advocated by Vietnam Veterans here would allow veterans' rights groups, like Vietnam Veterans and other interested parties, to resort to the courts to ensure that, at least on the level of regulations and policies, the Veterans' Administration actually implements the will of Congress.

SUMMARY OF ARGUMENT

The jurisdictional issues presented by these consolidated cases are the subject of sharply conflicting decisions by the courts of appeals. As a result of the existing disarray in judicial interpretation of section 211(a), critical issues affecting thousands of veterans may be totally insulated from judicial review. That result is neither required nor intended by section 211(a).

Section 211(a) of the Veterans' Benefits Law clearly precludes federal court review of Veterans' Administration decisions on individual veterans' claims for benefits provided under the Veterans' Benefits Law. The statute does not preclude judicial review of the validity of Veterans' Administration regulations and policies of broad application. Any attempt to construe section 211(a) more broadly must be rejected in light of the strong presumption that final agency action is reviewable unless there is "persuasive reason to believe" that Congress intended to bar such review. *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2135 (1986). This presumption can be overcome only by specific language barring review, or by a strong showing of congressional intent, based on specific legislative history, or through the legislative scheme of the statute. None of these indicators of congressional intent to bar judicial review exists in the case of section 211(a).

First, the language of section 211(a) does not reveal a congressional intent to prohibit judicial review of the validity of VA regulations and policies. Instead, the language of the statute only bars review of VA "decisions" on claims of individual veterans for benefits. Second, the legislative history of section 211(a) confirms that the congressional intent to preclude judicial review extends only to adjudication of individual benefits claims. The statutory language of the precursors of section 211(a) indicates that there was to be no review of individual benefits determinations. The various alterations made to

the language of the "limited review" provision were not intended to and did not alter the original scope of section 211(a). Post-enactment congressional consideration of the statute has also relied on an interpretation of section 211(a) which allows for judicial review of the validity of VA regulations and policies. This reliance has been fostered by the position taken by the Veterans' Administration, which has consistently maintained before Congress that section 211(a) does not need to be amended because it does not bar review of the validity of VA regulations and policies of broad application.

Finally, the purposes underlying section 211(a), as identified by this Court in *Johnson v. Robison*, 415 U.S. 361 (1974), would not be served by construing the statute to bar judicial review of VA regulations and policies of broad application. Judicial review of the validity of regulations would not overload the courts with cases concerning veterans benefits. The validity of a regulation affecting *all* veterans can be readily established, typically in a single litigation. The small number of judicial challenges to VA regulations presented to those federal courts authorizing review of VA regulations and policies under section 211(a) supports this conclusion. In addition, judicial review of the validity of regulations and policies would not intrude upon VA decision making. The validity of regulations is a matter clearly within the competence of the federal courts, and those courts can defer to the agency's expertise by exercising a more lenient standard of review where circumstances so warrant.

ARGUMENT

I. THE TRAYNOR COURT'S OVERLY BROAD READING OF SECTION 211(a) THREATENS TO PRECLUDE JUDICIAL REVIEW OF ISSUES OF GREAT CONCERN TO VETERANS

By its own terms, section 211(a) prohibits review of decisions of the VA regarding individual veterans' entitlement to benefits. Irreconcilable conflicts now exist, however, as to whether section 211(a) has any preclusive effect on judicial review of VA determinations other than individual benefits decisions. In the wake of this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974), four courts of appeals have held that section 211(a) does not bar review of VA regulations or other VA policies of broad application. Other courts of appeals—including the Second Circuit in the case now before this Court—have taken exactly the opposite position, broadly construing section 211(a) to immunize virtually every action of the VA from judicial scrutiny.[3]

This sharp conflict creates an untenable situation in which veterans' ability to challenge the rules and policies that govern their statutory right to benefits is not determined by jurisdictional principles and congressional intent, but by the location of the court in which the claim arises. As a result of the existing disarray in judicial interpretation of section 211(a), significant challenges to VA actions of broad import may go unheard and the VA

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[3] Although the case of petitioner McKelvey does not directly raise the judicial review issue, it illustrates the need for a uniform and reasoned approach to review of VA regulations and policies. The Court of Appeals for the District of Columbia stated that in making its decision it did not "pass on whether [section] 211(a) precludes review of veterans' benefit regulations to determine whether they exceed the VA's statutory authority" because under the peculiar circumstances of that case such a determination was unnecessary. 792 F.2d 194, 199 (D.C. Cir. 1986). The *McKelvey* court's resolution of the jurisdictional question provides little guidance as to the scope of 211(a).

may avoid any obligation to conform its rules and policies to congressional directives.

The conflict as to the scope of section 211(a) has been heightened by the VA itself. While repeatedly testifying before congressional committees that the statute does not bar review of VA regulations and policies, the VA has taken a directly contrary position in the courts, insisting—as in the instant cases—that VA regulations and policies are immune from judicial review.

The need for a determination by this Court as to the precise scope of section 211(a) is clear and urgent. The cases now before this Court, and in particular the Second Circuit's decision in *Traynor*, provide a vehicle for resolving the conflict between the circuits and removing the need for continuous relitigation of the scope of section 211(a). This Court should not delay in providing the lower courts with clear direction as to the proper interpretation of this statute.

• • • •

Section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a) (1982), is a "limited review" provision. Section 211(a) provides in relevant part:

> the *decisions* of the Administrator on *any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans* and their dependents and survivors shall be final and conclusive and no . . . court . . . shall have power or jurisdiction to review any such decision . . . .

38 U.S.C. § 211(a) (emphasis added).

The provision was clearly designed to exempt some VA actions from judicial scrutiny. It has long been accepted that judicial review of adjudications of the benefits claims of individual veterans is precluded by section 211(a). *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 307 (1985); *Johnson v. Robison*,

415 U.S. at 367. This preclusion is evident from the language of section 211(a).

However, as this Court announced in *Johnson v. Robison*, not all actions of the Veterans' Administration are rendered immune from judicial review by section 211(a). That case involved a challenge to the constitutionality of veterans' benefits legislation. Emphasizing that the language of the statute did not present an explicit bar to the judicial review of such challenges, this Court examined both the legislative history and the purposes of the statute in order to determine the scope of section 211(a). This Court concluded that a decision arises under a law administered by the VA only if it "is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts," strongly suggesting that section 211(a) applies only in the case of individual benefits adjudications. This Court also concluded that section 211(a) restricted review only of those decisions of law or fact arising in the VA's administration of a statute providing for veterans' benefits. *Id.*

Following *Johnson v. Robison*, several courts of appeals applied this Court's analysis of section 211(a) to authorize judicial review of the validity of VA regulations and policies. In *Wayne State v. Cleland*, 590 F.2d 627 (6th Cir. 1978), the Sixth Circuit considered a claim by a university and a class of veteran students that certain VA regulations governing educational benefits had been promulgated without statutory authority. The Sixth Circuit relied closely on this Court's rationale in *Johnson v. Robison* in finding that section 211(a) had only limited preclusive effect. The court observed that suits challenging the authority of the VA to promulgate regulations would neither involve the courts in complex and technical VA policy issues nor create suits requesting "federal courts to second guess the Administrator on the merits of particular claims for benefits or the termination of such benefits." 590 F.2d at 631. The Sixth Cir-

cuit reasoned that to construe section 211(a) broadly would be to find that Congress had intended to allow the VA to define the limits of its own authority. The court refused to endorse such a construction, which it believed would raise serious doubts about the constitutionality of section 211(a). *Id.* at 632.

Faced with suits challenging the same or similar educational benefit regulations, three other circuit courts adopted the reasoning of *Wayne State*. The Eighth, Ninth and Fourth Circuits concluded that section 211(a) was designed to preclude judicial review of VA decisions on individual benefit claims but not to bar judicial review of regulations promulgated by the VA. *See Merged Area X (Education) v. Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland v. Cleland*, 621 F.2d 98, 101 (4th Cir. 1980).

This consensus regarding the scope of section 211(a) was broken by the decision of the District of Columbia Circuit in *Gott v. Walters*, 756 F.2d 902 (D.C. Cir.), *vacated and reh'g granted*, 791 F.2d 172 (D.C. Cir.) (*en banc*), *remanded with instructions to dismiss as moot*, 791 F.2d 172 (D.C. Cir. 1985) (*en banc*), in which that court ruled that section 211(a) *expressly* precludes judicial review of the VA's regulations and their promulgation.[4] Although the *Gott* decision was later vacated, its reasoning was adopted by the Federal Circuit in *Roberts*

[4] The district court in *Gott* had held that section 211(a) did not bar review of the VA's promulgation of rules and policies, and the litigation before the Court of Appeals focused on the merits of the case. A sharply divided panel of the District of Columbia Circuit, however, held over a strong dissent that virtually every action or determination of the VA was immune from judicial review. The *Gott* plaintiffs sought rehearing of the jurisdictional issue, and the court vacated the panel's decision and agreed to rehear the case *en banc*. Prior to rehearing, however, the case was settled, with the VA agreeing to grant substantial relief on the merits to the plaintiff veterans, and the *en banc* court dismissed the appeal as moot.

v. Walters, 792 F.2d 1100 (Fed. Cir. 1986) (constitutional challenges the sole exception to the preclusive effect of section 211(a)).

Most recently, the case of petitioner Traynor presented the Second Circuit with the question whether section 211(a) precludes judicial review of VA regulations for compliance with other federal statutes. The Second Circuit adopted the broadest possible reading of section 211(a) and determined that the statute precludes review of VA regulations and policies, even in the face of claims that they contravene clear requirements of federal law. The court was led to this erroneous conclusion by its assumption that Traynor's allegations constituted no more than a challenge to the Administrator's denial of his benefits claim.[5] In fact, however, Traynor did not challenge the application of the alcoholism policy to the particular facts of his case. Instead, he asserted a broad-based cause of action seeking a declaration that the alcoholism policy violated both the governing statute and the Constitution. The *Traynor* court's failure accurately to evaluate the procedural posture of the case caused it to deny review of the VA's alleged *ultra vires* acts.

Following upon the narrow reading given section 211(a) in the Fourth, Sixth, Eighth and Ninth Circuits, the *Traynor* line of cases has raised a clear and pressing question as to the scope of section 211(a). No disagreements exist among these courts as to the effect of section 211(a) on individual benefits determinations. Where the veteran challenges the factual findings of the Admin-

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[5] The *Wayne State* line of cases cannot properly be distinguished from *Traynor* on the ground that they involved "broad challenges to the validity of a VA regulation brought by educational institutions interested in the overall administration of the VA educational benefits program." *Traynor*, 791 F.2d at 230. Both the *Wayne State* and *Merged Area X* cases had individual veterans as well as university plaintiffs challenging the VA regulations at issue. Moreover, section 211(a) clearly provides no authority for distinguishing among plaintiffs eligible to challenge VA actions.

istrator as to the veterans' entitlement to benefits, the courts of appeals agree that judicial review is barred. Similarly, if the veteran challenges the Administrator's interpretation of a statute or regulation as applied to an individual benefits determination, the courts of appeals also agree that there is no judicial review as to that "decision[ ] . . . of law." Also, in light of this Court's decision in *Johnson v. Robison*, the courts of appeals apparently agree that constitutional challenges to the VA's actions, regulations, and policies are subject to judicial review under section 211(a).

However, in clear conflict with the *Wayne State* line of cases, the *Traynor* line of cases would immunize every other act of the VA from judicial scrutiny. This expansive reading of section 211(a) is not authorized by the terms of the statute and is not supported by congressional intent or the policies underlying the statute. *See* Argument II, *infra*. Moreover, the *Traynor* analysis suffers from a critical failure to evaluate the procedural posture of challenges to VA actions and to consider the consequences if the VA is placed beyond any obligation to follow federal law. The superficial *Traynor* analysis of the scope of section 211(a) must therefore be rejected.

In resolving the conflict that now exists concerning the scope of 211(a), this Court should be guided by what the VA itself has repeatedly said in informing Congress that section 211(a) does not bar court review of challenges to VA regulations or other policies of broad application that are inconsistent with the Veterans' Benefits Law.[6] Accordingly, this Court should find that where it

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[6] The VA has taken this position in every recent hearing concerning legislation to limit the present scope of section 211(a). In 1982, the statement of the VA's Acting Administrator was that:

> We continue to believe that there should be access to the courts for challenges to the constitutionality of veterans' benefits legislation, regulations, and procedures. . . . In addition, we are cognizant of an emerging trend in several Federal district

is alleged that the VA has exceeded its authority in implementing the governing statute or has failed to implement that statute, court jurisdiction exists to review those allegations. Such litigation would not encompass review of VA decisions on individual benefits claims. Similarly, this Court should find that section 211(a) does not bar challenges to the methods by which the VA promulgates its regulations and policies. Such familiar challenges asserting basic rights to notice and comment do not impinge upon the interests protected by section 211(a).

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courts and courts of appeals toward permitting judicial review of allegations that a regulation was promulgated in excess of the Administrator's authority or otherwise contrary to law. This growing body of case law would seem to provide a sufficient basis for review of substantive agency actions of broad binding application, without the need for new legislation.

Veterans' Administration Adjudication Procedure and Judicial Review Act: Report of the Senate Committee on Veterans' Affairs to Accompany S.349, 97th Cong., 2d Sess. 83 (1982) (statement of Donald Curtis, Acting Administrator).

In 1984, the VA took the same position during Congressional consideration of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984:

> I continue to believe that VA regulations should be, and are, reviewable in the Federal courts. This principle was further explained by the Acting General Counsel last summer, when he indicated to the Committee that "legislation, regulations and procedures" are judicially reviewable, as are "substantive Agency actions of broad, binding application."
>
> Section 211(a) has been properly limited by the courts so that it does not protect every decision, policy, or action of the VA from judicial scrutiny. Those Agency rules and procedures of broad and binding application which affect the rights of a number of claimants to VA benefits are not protected by Section 211(a). The way the VA processes and decides an individual benefit claim is clearly beyond the reach of the Federal courts, however.

Letter from Robert Nimmo, VA Administrator, to Sen. Cranston, Chairman of the Senate Veterans' Affairs Committee (March 29, 1982), *reprinted in* 130 Cong. Rec. S6160 (daily ed. May 22, 1984).

Finally, this Court should find that section 211(a) erects no jurisdictional bar to claims that VA regulations and policies contravene federal statutes other than those that the VA is delegated to administer.

This functional analysis of the scope of section 211(a) is neither abstract nor advisory. The need for a precise evaluation of the scope of the statute is presented directly by the cases now before this Court. The need for a clear demarcation of the rights of veterans to judicial review is also illustrated by other pending challenges to VA actions.

For example, Vietnam Veterans and a number of individual plaintiffs have brought suit in another important case challenging the validity of VA regulations. The class in *Nehmer v. United States Veterans' Administration.* No. CV-86-6160 (N.D. Cal. filed Oct. 31, 1986), is challenging the actions of the Veterans' Administration in the establishment and implementation of an entire program mandated by Congress related to the Agent Orange controversy, the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984, 38 U.S.C. § 354 (a). In essence, plaintiffs contend that the VA has contravened the purpose of the Act by failing to implement its key provisions, threatening to deprive thousands of veterans exposed to Agent Orange during service in Vietnam of the benefits granted to them by the Act. This challenge to the VA's actions includes allegations that the VA violated express provisions of section 354(a), thereby acting beyond its statutory authority,[7] as well as the due

[7] The *Nehmer* plaintiffs have alleged that the VA violated express provisions of the Act and exceeded its statutory authority by: (1) failing to adopt guidelines for evaluating the scientific evidence relating to dioxin; (2) failing to make evaluations of the findings of scientific studies relating to dioxin exposure; (3) failing to provide administrative support services and fiscal support for the Committee charged with reviewing the scientific evidence; (4) failing to ensure that veterans were provided with the benefit of reasonable doubt concerning whether a particular disease was associated with the period of service.

process clause of the Constitution.[8] Under the broad reading of section 211(a) reflected in *Traymor*, the non-constitutional regulatory challenges of the *Nehmer* plaintiffs would be precluded from judicial review.

The implication of the *Traynor* decision—that the VA is uniquely free to ignore the mandate of any federal statute with impunity and without the restraint of judicial review—is irrational and unjust. It is essential that this Court address the implications of *Traynor* and in doing so provide the lower courts with guidance on the scope of section 211(a).

II. SECTION 211(a) OF THE VETERANS' BENEFITS LAW DOES NOT PRECLUDE JUDICIAL REVIEW OF THE VALIDITY OF REGULATIONS OR POLICIES

Any consideration of whether final agency action is subject to judicial review must begin with the strong presumption that Congress intends such review. Judicial review will not be precluded unless there is "persuasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2135 (1986), *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1976).[9] The burden of establishing this "persuasive reason" rests with the party seeking to limit judicial review. Clear and convincing evidence of an intent to bar review must

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[8] The Veterans' Administration has moved to stay the *Nehmer* proceedings pending a decision by this Court on the instant cases. That motion is currently pending before the United States District Court for the Northern District of California.

[9] This jurisdictional principle is established by a long line of this Court's decisions. *See, e.g., Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Tooahnippah v. Hickel*, 397 U.S. 598, 606 (1970); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 156-157 (1970); *Barlow v. Collins*, 397 U.S. 159, 166 (1970); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962).

be presented before the courts may limit review. Where substantial doubt exists concerning congressional intent, the presumption favoring review is controlling. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985); *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984).

While not irrebuttable, the presumption in favor of judicial review may be overcome only by specific statutory language barring review, by specific legislative history that is a reliable indicator of congressional intent or by congresssional intent that is fairly discernible in the detail of the legislative scheme. *Block*, 467 U.S. at 349, 351. No convincing evidence exists to overcome the presumption in the case of section 211(a). Neither the language of the statute, the legislative history nor the purpose of section 211(a) provides any indication of a congressional intent to preclude judicial review of the validity of VA regulations or policies.

A. The Language of Section 211(a) Evidences Its Limited Preclusive Effect

Any attempt to read section 211(a) as broad enough to bar judicial review of all VA actions runs counter to the language of the statute. Section 211(a) prohibits judicial review of "decisions . . . on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans. . . ." 38 U.S.C. § 211(a). The statutory provision does not expressly preclude judicial review of the validity of VA regulations or policies. On the contrary, the use of the word "decisions" indicates that Congress intended to bar judicial review only of individual benefits determinations.[10]

Such a reading of section 211(a) is consistent with this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974). In *Johnson v. Robison*, this Court identified two elements of section 211(a) that require the provision to be construed as having limited preclusive effect. First,

the Court stated that a decision "arises under any law administered by the VA" within the meaning of section 211(a) only if it "is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts." 415 U.S. at 367. In other words, the language of section 211(a) should be interpreted to preclude the review of fact-based determinations made by the VA concerning individual benefits claims.

The fundamental flaw in the decision of the *Traynor* majority, as discussed above, was its assumption that petitioner Traynor's challenge to the alcoholism policy constituted a challenge to the VA's decision on his particular benefits claim. But when the VA promulgated its alcoholism policy, which was the sole focus of Traynor's court challenge, it was not applying "a particular provision of the statute to a particular set of facts."

The second restriction on the scope of section 211(a) established in *Johnson v. Robison* is that the statute only precludes judicial review of laws administered by the VA. 415 U.S. at 367. This second limitation is the basis for the reasoning of the dissent in the *Traynor* case. Judge Kearse reasoned that petitioner Traynor's challenge to the VA policy on alcoholism raised a question not under a law administered by the VA but under the Rehabilitation Act. 791 F.2d at 232-233. While this reasoning does provide a basis for jurisdiction in the cases now before this Court, there is no need for the Court to restrict its holding to the second prong of the *Johnson v. Robison* analysis. *Johnson v. Robison* clearly

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[10] In the context of the Veterans' Benefits Law, Congress has clearly differentiated between "decisions" issued by the VA and "regulations" adopted by the agency. Section 4004 of the Veterans' Benefits Law defines the authority of the Board of Veterans Appeals ("BVA") to make "decisions" concerning all veterans' appeals (38 U.S.C. § 4004(a)) and requires BVA in making such decisions to adhere to the "regulations" of the VA (38 U.S.C. § 4004(c)).

suggested that section 211(a) applies only to VA decisions involving individual benefits claims. This case provides an appropriate vehicle for confirming this aspect of *Johnson v. Robison* in order to dispel any uncertainty as to the scope of section 211(a).

B. The Legislative History of Section 211(a) Indicates Its Limited Preclusive Effect

There is no specific legislative history that manifests congressional intent to preclude review of the validity of VA regulations or policies. Indeed, the limited legislative history that does exist demonstrates that Congress intended that the preclusive effect of section 211(a) be limited to individual benefits determinations. This conclusion stems from an examination of the statutory precursors of section 211(a). While the relevant wording of the "limited review" provision has been changed two times since its original enactment, those changes were not meant to alter the scope of the provision as originally enacted. *Johnson v. Robison*, 415 U.S. at 368-374.

A "limited review" clause was included in section 5 of the statute that created the Veterans' Administration, the Economy Act of 1933, Pub. L. No. 73-2, § 5, 48 Stat. 8, 9 (1933). This provision precluded judicial review of "[a]ll decisions rendered by the Administrator under the provisions of [the Act] or the regulations issued pursuant thereto." This Court's interpretation of section 5 of the Economy Act was that it

> concerns *only grants* to veterans and their dependents—pensions, compensation, allowances, and special privileges, all of which are gratuities. The purpose of the section appears to have been to remove the possibility of judicial review in *that class of cases*. . . .

Lynch v. United States, 292 U.S. 571, 587 (1934) (emphasis added). This reading of section 5 suggests that

Congress intended to limit review only of decisions on individual *benefits* claims. While the statute contemplated that the VA would apply its regulations in reaching such non-reviewable decisions, it certainly did not indicate that such regulations themselves were immune from judicial review.

In 1940, the language of the "limited review" provision was changed significantly to clarify the original intent of the jurisdictional restriction. The 1940 language barred review of "decisions of the Administrator" on questions of law or fact concerning *"a claim* for benefits or payments." The use of the term "decisions" together with the word "claim" strongly suggests that only decisions on individual claims for benefits were to be barred from judicial review. In a complementary provision of the 1940 Act, Congress set forth the jurisdiction of the Board of Veterans Appeals ("BVA"). That provision gave the BVA jurisdiction over "all questions on claims involving benefits under the laws administered" by the VA. 38 U.S.C. § 4004(a). These parallel provisions allocated appellate functions between the BVA and the courts. The BVA was given jurisdiction over all benefits claims decided in the first instance by VA regional offices—precisely the matters that, according to the "limited review" provision, could not be reviewed by the courts. This grant of jurisdiction to the BVA clearly did not extend to the review of VA regulations or policies. *See* 38 U.S.C. § 4004(c).

In 1970, the "limited review" provision was amended to its present form.[11] The legislative history of the 1970 amendment clearly indicates that this final alteration in the language of section 211(a) had one narrow purpose, to overrule a series of decisions by the Court of

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[11] The changes to the statute made in 1957 left untouched the relevant language of the 1940 amendment.

Appeals for the District of Columbia Circuit.[12] In those decisons,[13] the D.C. Circuit had determined that the phrase "a claim" encompassed only an original application for benefits. As a result the court held that subsequent action by the Administrator, such as a reduction or termination of benefits, was not an adjudication of a claim and hence was not precluded from review by section 211(a). In order to guarantee that *all* adjudications concerning individual benefits determinations remained immune from review, Congress eliminated the words "a claim" and substituted the present language of section 211(a). Congress did not intend to change the meaning of section 211(a) except to overrule the D.C. Circuit definition of "a claim." *Johnson v. Robison*, 415 U.S. at 371-73.

The statutory precursors to section 211(a) were intended solely to limit the judicial reviewability of individual benefits determinations. None of the "limited review" provisions expressly or implicitly included VA regulations or policies within their scope. Thus, the legislative history contains no evidence—let alone a clear and convincing indication—of congressional intent broadly to restrict judicial review.

In addition, since the enactment of section 211(a) in its present form, Congress has relied on an interpretation of the statute which allows judicial review of the validity of VA regulations.[14] Either the House or the

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[12] *See* H.R. Rep. No. 1166, 91st Cong., 2d Sess. 8-11, 19-24 (1970).

[13] *Tracy v. Gleason*, 379 F.2d 469 (D.C. Cir. 1967); *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962); *Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958).

[14] The post-enactment Congressional consideration of section 211(a) is instructive, though not controlling, as to the intent of the enacting Congress. *See Universities Research Association v. Couto*, 450 U.S. 754, 778 (1981). The views of the later Congresses can indicate that the legislative body shared and acted upon a consensus regarding the meaning of a particular statute. *See, e.g., Grove City v. Bell*, 465 U.S. 555, 567-568 (1984); *Bell v. New Jersey*, 461 U.S.

Senate considered the scope of section 211(a) in each one of the last five Congresses.[15] Each congressional review of the "limited review" provision involved consideration of whether section 211(a) should be amended to authorize review of VA decisions concerning individual benefits claims. Throughout these hearings representatives of the Veterans' Administration have testified that section 211(a) does not preclude judicial review of the validity of regulations.[16] According to the VA's latest pronouncement, the VA "regards its regulations and substantive agency actions of broad application to be subject to ju-

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773, 784-87 (1983); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 668-72 (1980).

[15] *See, e.g., H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the Committee on Veterans' Affairs, House of Representatives*, 99th Cong., 2d Sess.; *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearings on S. 636 and Related Bills Before the Senate Veterans' Committee*, 98th Cong., 1st Sess.; *Judicial Review of Veterans' Claims: Hearings Before the House Veterans' Affairs Subcommittee on Oversight and Investigations*, 98th Cong., 1st Sess.; *Judicial Review of Veterans' Claims: Hearings Before the House Veterans' Affairs Subcommittee on Special Investigations*, 96th Cong., 2d Sess.; *Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings Before the Senate Veterans' Affairs Committee*, 97th Cong., 1st Sess.; *Veterans' Administration Adjudication Procedures and Judicial Review Act: Hearings Before the Committee on Veterans' Affairs, United States Senate*, 96th Cong., 1st Sess.; *VA Administrative Procedure and Judicial Review Act: Hearings before the Committee on Veterans' Affairs, United States Senate*, 95th Cong., 1st Sess.

[16] From 1952 until the most recent hearings, the VA has testified that section 211(a) *does not* prohibit judicial review of all VA determinations. *See, e.g., Hearings on H.R. 360, 478, 2442 and 677 Before a Subcommittee of the House Committee on Veterans' Affairs*, 82d Cong., 2d Sess. 1962-63 (1952); *Veterans' Administration Procedure and Judicial Review Act: Report of the Senate Committee on Veterans' Affairs to Accompany S. 349*, 97th Cong. 2d Sess. 83 (1982) (statement of Donald Curtis, Acting Administrator).

dicial review. Accordingly, there are many instances in which section 211(a) . . . does not preclude judicial review at least with respect to these questions of law." [17]

Congress apparently has accepted this VA interpretation as persuasive as to the scope of section 211(a). Accordingly, the representations of the Veterans' Administration concerning the scope of section 211(a) must be accorded great weight. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768, 788 (1985).

Similarly, Congress has acquiesced, from 1978 until today, in courts of appeals decisions such as *Wayne State* allowing judicial review of the validity of regulations. Such acquiescence suggests that these decisions were in keeping with congressional intent regarding the scope of section 211(a). Congress clearly would have been capable of responding to these judicial decisions if it believed that they thwarted its intentions regarding judicial review of VA determinations. In fact, it did so in 1970 because of its dissatisfaction with the District of Columbia Circuit's interpretation of the 1940 version of section 211(a), but it has not done so in the nine years that have elapsed since *Wayne State*.

C. The Purposes Served by Section 211(a) Require Only a Limited Preclusive Effect

The purposes served by precluding judicial review of VA decisions on individual benefits claims do not come into play when the validity of VA regulations or policies is at issue. In *Johnson v. Robison* this Court determined that Congress enacted section 211(a) to serve "two primary purposes: (1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time consuming litigation; and (2) to insure that technical and complex determinations and applications of Veteran's Administration policy connected with veterans' benefits decisions will be

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[17] *1986 House Hearings*, Vol. II at 328.

adequately and uniformly made." 415 U.S. at 370. Judicial review of the validity of VA regulations and policies would not undermine either purpose. First, judicial review of such cases would not overload the courts. Permitting review of a statutory or administrative standard would not create a flood of litigation because the validity of a standard can be readily established, typically in a single litigation. *Bowen v. Michigan Academy*, 106 S. Ct. at 2141 n.11.

The nature of the regulatory challenge presented by petitioners Traynor and McKelvey is illustrative. Petitioners contend that the VA, like every other executive agency, must comply with the Rehabilitation Act of 1973, as amended. Should petitioners' challenge succeed in this Court, the VA's alcoholism policy would be invalidated. As a result threshold questions that arise in cases relating to educational benefits as well as pension and other benefits currently affected by the policy would be resolved without further resort to the courts.

The federal courts are well equipped to consider and summarily reject cases which are clothed as regulatory challenges but actually present appeals of individual benefit determinations. The courts have done just this in cases alleging constitutional challenges to veterans' benefits legislation. *See Rosen v. Walters*, 719 F.2d 1422, 1423 (9th Cir. 1983); *Pappanikolaou v. Adm. of Veterans' Administration*, 762 F.2d 8, 9 (2d Cir. 1985).

Past experience also suggests that a holding that VA regulations and policies are subject to review will not burden the courts.[18] From 1978, when the Sixth Circuit

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[18] This Court has addressed a similar concern in *Bowen v. Michigan Academy*. At issue in *Bowen* was whether the method by which Medicare benefits are determined—as opposed to the actual calculation of benefits—was subject to judicial review. The Court noted that it had not observed a flood of litigation in the past and doubted that there would be a future inundation. 106 S. Ct. at 2141 n.11.

decided in *Wayne State v. Cleland* that VA regulations were reviewable, until 1985 when the first cases reaching a contrary result were decided, only a handful of cases challenging VA regulations or policies has reached the courts of appeals. Congress achieved its goal of limiting the burden on the courts by denying review of VA decisions on individual benefits claims.

Second, allowing judicial review of the validity of regulations would not interfere with the uniformity of VA decision making concerning technical and complex determinations. In articulating this second purpose for section 211(a), this Court referred in *Johnson v. Robison* to a 1952 opinion of the VA Administrator that in the *adjudication* of compensation and pension claims a wide variety of medical, legal and other technical questions arise which require use of experts and which are not susceptible of legal standardization. 415 U.S. at 370 n.12. All of the technical and complex determinations listed by the Administrator in that letter, such as those involving length of service, origin of disability and rating schedules, arise in individual benefits claims and relate to factual findings which must be made by the VA.

In contrast, petitioners in this case do not request the Court to review any technical factual questions concerning their individual entitlement to benefits. Rather, petitioners request the Court to review the legality of VA action by determining whether a VA-promulgated policy violates another federal statute, the Rehabilitation Act. To the extent that the courts are required to assess technical or complex issues in passing on the validity of VA regulations or policies, such tasks are not beyond their competence or experience. Where necessary the courts may appropriately rely on the technical expertise of the VA by adopting a deferential standard of review that acknowledges the agency's expertise.

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There is no clear and convincing evidence to overcome the presumption that judicial review of Veterans' Admin-

istration regulations and policies is available under section 211(a). On the contrary, the language of the statute, its legislative history, and the purposes of the provision as identified by this Court all suggest that section 211(a) bars review only of VA decisions on individual claims for veterans benefits. To construe section 211(a) more broadly, as the Second Circuit did in *Traynor*, would be to contravene this Court's rulings concerning the availability of judicial review and to countenance the dangerous and irrational proposition that the Veterans' Administration is free to disregard the will of Congress.

CONCLUSION

For all of the foregoing reasons, Vietnam Veterans of America respectfully requests that this Court confirm that section 211(a) of the Veterans' Benefit Law does not preclude the judicial review of the validity of VA regulations and policies of broad application.

Respectfully submitted,

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